SUPREME COURT, U. S.

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FILED
DEC 19 1963
JOHN F. DAVIS, CLERK

No. 675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CRAWFORD MARTIN, as Secretary of State of the State of Texas, JOHN CONNALLY, as Governor of the State of Texas, WAGGONER CARR, as Attorney General of the State of Texas, and EUGENE LOCKE, as Chairman of the State Democratic Executive Committee of Texas,

Appellants,

v.

GEORGE H. W. BUSH, MRS. TOM M. THAWLEY, ROLAND E. SLEDGE, ANTHONY J. P. FARRIS AND BARBARA BARRETT,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MOTION TO AFFIRM

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No.

In The

Supreme Court of the United States

October Term, 1963

Crawford Martin, as Secretary of State of the State of Texas, John Connally, as Governor of the State of Texas, Waggoner Carr, as Attorney General of the State of Texas, and Eugene Locke, as Chairman of the State Democratic Executive Committee of Texas,

Appellants,

v.

George H. W. Bush, Mrs. Tom M. Thawley, Roland E. Sledge, Anthony J. P. Farris and Barbara Barrett,

Appellees.

On Appeal from The United States District Court for the Southern District of Texas, Houston Division

MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellees in the above-entitled case move to affirm under Rule 16 (c) on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

It is the position of these appellees that all of the substantial questions presented in this appeal concerning the granting of judicial relief against invidiously discrimina-

tory congressional apportionment have recently been thoroughly and ably briefed and argued in *Wesberry* v. *Sanders*, No. 22, O.T. 1963, and there is therefore no need for further briefing and argument of these points. To be specific, the following are the questions which the *Wesberry* case and the present appeal have in common:

1. Justiciability.
2. Want of equity.
3. Constitutional standards.
4. Relief.
   a. Timing.
   b. At-large elections.

In-so-far as this Court disposes of these questions in the *Wesberry* case, it will dispose of them in the present appeal.

Assuming that this Court upholds all of the contentions of the appellants in the *Wesberry* case, the motion of these appellees for affirmance should be granted since *no substantial questions are presented by this appeal which have not been raised in the Wesberry case.* That there are no other substantial questions in this case can be demonstrated by briefly reviewing the "Questions Presented by the Appeal" enumerated in the jurisdictional statement of appellants Martin, *et al.*

1. The appellants' first point is that the case made by appellees herein is not justiciable. This point was briefed and argued at length in the *Wesberry* case. Its insubstantiality on the merits is demonstrated by the fact that *no* court has ever held such a case to be non-justiciable, while the majority opinion of this Court in *Baker* v. *Carr*, 369 U.S. 186 (1962), clearly indicated that such cases are jus-

ticiable and the statutory court which heard the *Wesberry* case unanimously held for justiciability. Any doubt which might remain on this point will certainly be settled by the decision in the *Wesberry* case and the matter need not be pursued further in the present appeal.

2. The appellants' second point is that the Constitution gives the Congress exclusive supervisory jurisdiction over the field of apportionment of congressmen among districts within the states. This point was also briefed and argued at length in the *Wesberry* case and there is no need to pursue it further on this appeal. Suffice it to say that *Smiley* v. *Holm*, 285 U.S. 355 (1932) and *Colegrove* v. *Green*, 328 U.S. 549 (1936) long ago settled this point in favor of appellees.

3. The appellants' third point is that these appellees are not entitled to relief unless and until they pursue and exhaust their so-called "administrative" remedy of seeking relief from the Congress. The novelty and insubstantiality of this point is amply demonstrated by the lack of authority cited in support thereof. Only one isolated phrase in the majority opinion of the trial court in the *Wesberry* case (see Jurisdictional Statement, page 25) gives the least appearance of offering comfort to appellants on this point, but this phrase must be read in context (206 F. Supp. at 285), and when this is done it is obvious that Judges Bell and Morgan did not have appellants' unprecedented theory in mind. Appellants' third point is so obviously insubstantial as to require no further argument in this appeal.

4. The appellants' fourth point is that the trial court should have dismissed or abated appellees' suit pending the laying down of "guidelines" by this Court. This point was not raised in the *Wesberry* case but it is clearly insubstantial and presents no basis for argument in this Court

since the ultimate thrust of this point is that the trial court should have ignored the duties imposed on it by Article III of the United States Constitution. Furthermore appellants would have had the trial court abdicate its judicial duty on the basis of an insupportable chain of assumptions, namely: (a) that the one case pending in this Court in which "guidelines" could be announced would be carried through to final decision by this Court, *i.e.*, that no intervening event such as a reapportionment of congressional districts in Georgia would cut off the judicial process; (b) that this Court would, contrary to the arguments of some parties, *e.g.*, the appellees and the Solicitor General in the *Wesberry* case, announce "guidelines" in such case; and (c) that such "guidelines" would be of such general application as to be binding upon and of assistance to the Texas Legislature. The court below correctly refused to accept this tenuous line of reasoning as a basis for sidestepping its constitutional duties.

5. The appellants' fifth point is that the cumulation of the factors stated in points 2, 3 and 4, together with "other facts," required dismissal for want of equity. It has been shown to the Court that points 2, 3 and 4 by themselves do not require such dismissal. If these points standing alone show no want of equity, appellees cannot see how lumping them together will change the result, even when appellants' "other facts" are added in. These "other facts" turn out to be nothing more than a quotation from Judge Noel's dissent which purports to show that the Texas Legislature will not reapportion in t[illegible] for the 1964 elections. Judge Noel's argument (which is [illegible]fly answered by the availability of emergency legislative procedures in Texas) belongs under the heading of timing of relief [appellants' point

9(b)] where it will be discused herein.[1] It clearly has nothing to do with the question of dismissal for want of equity. Appellants' fifth point urging cumulative want of equity is as insubstantial as its constituent parts and need receive no further consideration by this Court.

6. The appellants' sixth point is that the court below, having found a present deprivation of appellees' preferred constitutional rights, should have given the Texas Legislature time to work the matter out before enjoining the holding of elections under the unconstitutional reapportionment statute (Article 197a, Revised Civil Statutes of Texas). Appellants cannot deny that, assuming Governor Connally continues to refuse to call a special session, it will be 1965 at the earliest before the Legislature can act and in the meantime Texas' 23 congressmen will have been

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[1] That there was and is ample time for the Texas Legislature to act will be demonstrated later, but appellees would note at this point the "you-can't-get-there-from-here" nature of Judge Noel's analysis of the problem of timing judicial and legislative action in this case. First he indicates (Jurisdictional Statement, page 114) that the court should not entertain such a suit as this while the Legislature is considering the problem. Since the Texas Legislature has regular sessions lasting roughly from January through May of odd numbered years, plaintiffs in a congressional reapportionment case could not, as a practical matter, file suit until June of such odd-numbered year, after the Legislature had adjourned. Judge Noel also indicates (Jurisdictional Statement, page 86) that judicial action must be completed well before November 4 of the same year. This leaves less than five months for a Texas congressional reapportionment case to progress from pleadings through the pretrial, trial and appellate stages — a patently impossible time schedule in all but the most unusual cases. It is clear that these appellees may not be deprived of their preferred constitutional rights by such unrealistic misapplication of dates, especially where it is urged as a ground for dismissal for want of equity.

elected under an unconstitutional statute.[2] As the majority of the court below pointed out (Jurisdictional Statement, page 73), it would have been harsh and unfair to withhold injunctive relief in view of these facts. Appellants' sixth point does not require further briefing and argument in this Court.

7. The appellants' seventh point appears to be that the present apportionment of congressional districts in Texas does not violate the Equal Protection Clause of the United States Constitution. Appellants do not devote one word to explaining why this point is substantial, and, indeed, they admit that something must be done about the congressional apportionment situation in Texas (Jurisdictional Statement, page 13). This admission by appellants, together with their silence on the matter of substantiality and the extensive treatment accorded this point in the *Wesberry* case, show that this point needs no further argument in this Court.

8. The appellants' eighth point is that the standard announced by the court below as a guide for legislative action in establishing congressional districts is erroneous. The standard announced by the majority below coincides exactly with that advocated by the appellants in the *Wesberry* case and this matter was fully covered in briefs and arguments in the *Wesberry* case. There is thus no need for further argument on this point in this appeal.

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[2] Even though the judgment and decree of the court below were stayed by Mr. Justice Black on October 25, they stand as an adjudication by a court of competent jurisdiction that the present Texas congressional apportionment statute is unconstitutional. This situation is rendered all the more serious by the fact that the appellant state officials admit that such statute is unjustifiably discriminatory.

9. The appellants' ninth point is that the court below erred in ordering elections at large because (a) the court was without power to do so, and (b) granting the power, the 'cure is worse than the disease.' These sub-points will be discussed separately.

9(a). There is no doubt that even if the court below had not ordered elections at large, such would necessarily have followed when the Texas congressional apportionment statute was found to be unconstitutional. See *Smiley* v. *Holm*, 285 U.S. 355 (1932). There would be no point in briefing and arguing the metaphysical distinction between (1) a court's declaring rights, with the result that only one course of action is left to a state, and (2) a court's declaring rights and ordering that the one course of action which is then available to the state must be followed. This question of judicial power has, in effect, already been settled by this Court in *Smiley* v. *Holm, supra,* and is therefore insubstantial.

9(b). Is the cure of at-large elections or forced reapportionment worse than the disease of invidious discrimination?[3] If the courts are to have any effective power to deal with cases such as the present one, the answer to this question must be "No." In such cases relief should be withheld only where the plaintiffs have slept on their rights and where it is clearly shown that the invalidation of a state apportionment statute will unavoidably and irreparably disrupt state elective processes. Neither at the time of trial

[3] It should be noted that congressmen-at-large are nothing new in Texas. As Judge Noel pointed out, (Jurisdictional Statement, pages 84-85) there have been nine congressmen-at-large in Texas since 1910, and these nine have served a total of thirteen terms. It should also be noted that in recent times the Texas Legislature has, by inaction, sanctioned a congressman-at-large for Texas for the elections in 1952, 1956, 1958, 1962 and 1964.

nor at the present time has the present case presented either of these elements. These appellees timely filed suit (a full month before the end of the 1963 Regular Session of the Texas Legislature) to vindicate their rights and have pressed their cause with all possible speed. Now, with over ten months to go before election day in 1964 they are told by the appellant state officials that it is impossible to remedy an insupportable deprivation of their constitutional rights prior to such election day. In support of their position appellants say that a new apportionment statute cannot be passed and made effective prior to February 3, 1964, which, as the Texas statutes now stand, is the final date for congressional candidates to file in Texas primaries. However, appellants do not and cannot deny that a new apportionment statute might be passed as emergency legislation at a special session of the Legislature and made effective immediately on passage. Further, appellants do not and cannot deny that similar emergency legislation could be enacted to alter the February 3rd primary filing date. (Until a 1959 amendment to the Texas Election Code, the filing date was the first Monday in May.[4]) *Appellants thus do not and cannot deny that it would be possible to correct what they admit (Jurisdictional Statement, page 13) to be an indefensible discrimination,* nor do they deny that, as one of their expert witnesses stated (Transcript, page 54), the Texas Legislature could correct this situation in "thirty days time." They merely rely on speculation concerning whether the Legislature would or would not take the necessary action.

What the Texas Legislature would or would not do is irrelevant to this case. What is relevant and controlling in this case is the fact that (a) the Legislature has done

[4] See Laws of Texas, 1959, 56th Leg., p. 335, ch. 165, §3.

nothing about this problem during the three years the 1960 census figures have been available, and (b) there is still more than enough time for the Legislature to act before the 1964 elections. Throughout all stages of this case appellants have protested their good faith and have said the Legislature is only waiting for "guidelines." The trial court announced such "guidelines" which appellants rejected as not being "authoritative." (Jurisdictional Statement, page 29.[5]) This summary rejection of the trial court's reasoned conclusions is the core of appellants' ninth point and such point is therefore as insubstantial as the preceding eight points.

CONCLUSION

Not since 1933 has Texas had a comprehensive congressional reapportionment. As the chart attached as Appendix "A" shows, population growth and shifts have resulted in a steadily worsening ratio between the largest and smallest congressional districts in Texas until today this state has the largest such ratio in the country: 4.4 to 1. *Over two-thirds of the citizens in the state, in both rural and urban districts, reside in under-represented districts.*[6]

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[5] See also Governor Connally's press release of October 22, 1963 attached hereto as Appendix "B." (A certified copy of this press release was attached to appellees' Motion to Supplement Stay filed with the Clerk of this Court on November 3, 1963.)

[6] Footnote 8 of the majority opinion in the court below (see Jurisdictional Statement, page 50) shows that districts 2, 5, 8, 9, 12, 14, 15, 16, 19, 20 and 22 have a population in excess of 415,000 (one as high as 951,527, two over 670,000 — the smallest district in the state has a population of only 216,371) which, as footnote 9 of the majority opinion shows, is the state average on a 23 district basis. The total population in these districts is 6,392,698, which is over 2/3 of the total state population of 9,579,677.

These appellees timely sought relief which was granted by the trial court. Appellants have now appealed to this Court raising points the majority of which have been thoroughly briefed and argued for this Court in the *Wesberry* case, with the remainder being so insubstantial as not to need further argument. The judgment of the court below should therefore be affirmed in order that appellees' preferred constitutional rights may be vindicated in time for the November, 1964 general elections.[7]

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[7] From a practical standpoint, early in January would be the best time for action because of the February 3 filing date provided for under present Texas election laws. But the Legislature could change this date as it did in 1959 (see footnote 4, *supra*) when it moved the filing date back from the first Monday in May to the first Monday in February. Hence a decision as late as April (the month when *Smiley* v. *Holm*, 285 U.S. 355, and its companion cases were decided in 1932) could provide effective relief to the citizens of Texas for the 1964 election. It may be, however, that some question in the *Wesberry* case which is not raised in the present appeal will delay a decision of the questions these two cases have in common. In such event, and assuming the Court intends to grant Messrs. Wesberry, *et al.*, all the relief they have requested, appellees herein request that the Court consider the present motion as a request for vacation of the stay granted by Mr. Justice Black on October 25. If not timely vacated, this stay will operate as an adjudication against these appellees on the merits in-so-far as the 1964 elections are concerned.

Respectfully submitted,

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PROOF OF SERVICE

I, WILLIAM B. CASSIN, one of the attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of December, 1963, I served copies of the foregoing Motion to Affirm on the several parties hereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To HONORABLE WAGGONER CARR, Attorney General of the State of Texas, P. O. Drawer R., Capitol Station, Austin, Texas, 78711, attorney for Appellants, Crawford Martin, Secretary of State of the State of Texas, John Connally, Governor of the State of Texas, and Waggoner Carr, Attorney General of the State of Texas.

To WILL D. DAVIS, ESQ., Heath & Davis, 202 Perry Brooks Building, Austin 1, Texas and FRANK C. ERWIN, JR., ESQ., Brown, Sparks & Erwin, Brown Building, Austin, Texas, attorneys for Appellant Eugene C. Locke, Chairman, State Democratic Executive Committee of the State of Texas.

To JOE RESWEBER, ESQ., County Attorney of Harris County, Texas, Attention Charles F. Mitchell, Esq., Assistant County Attorney, 202 Courthouse, Houston 2, Texas, attorneys for William M. Elliott, County Judge of Harris County, Texas, and Robert E. Turrentine, Jr., County Clerk of Harris County, Texas.

To PATRICK B. GIBBONS, III, ESQ., 1400 First National Bank Building, Dallas, Texas and ROBERT E. NEWEY, ESQ., Houston First Federal Building, Houston, Texas, attorneys for Peter O'Donnell, Jr., Chairman of the State Republican Executive Committee of Texas.

.....

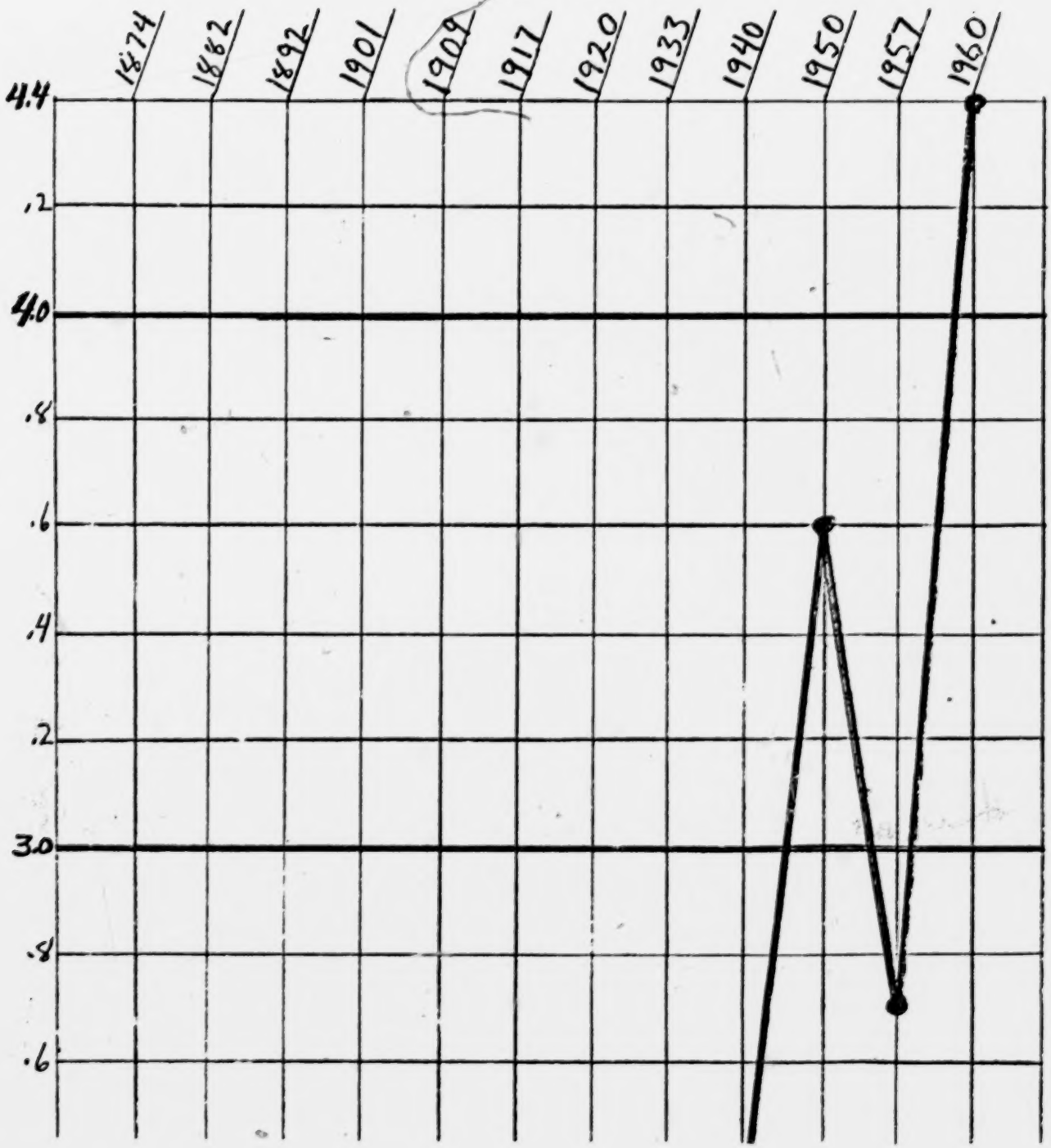
WILLIAM B. CASSIN

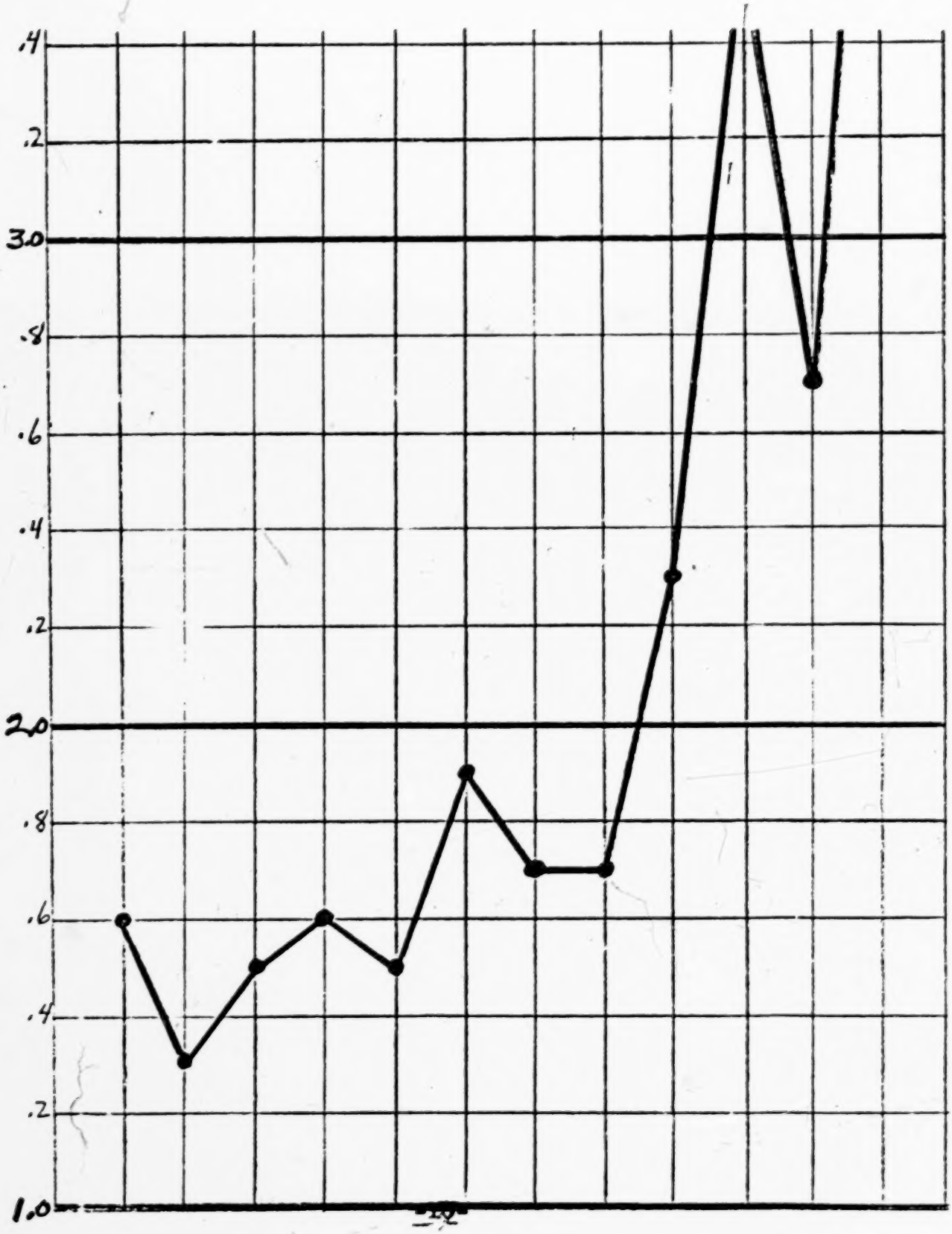
APPENDIX "A"

CHART*

Ratio Between Largest and Smallest Congressional Districts in Texas

(In Terms of Population)





* Part of Plaintiff's Exhibit No. 2 in the court below.

APPENDIX "B"

Press Statement October 22, 1963
Governor John Connally

Several months ago five Houston Republicans filed a suit in federal court to declare unconstitutional the Texas law which divides the state into several Congressional districts. These Republicans also asked the federal court to re-divide Texas into 23 new districts.

The case was heard in Houston September 23rd by a special three-judge court — two of whom were appointed by a Republican President. Last Saturday afternoon at 2:15 p.m. — 26 days after the trial — when state and federal offices are invariably closed, the same two Republican federal judges handed down a decision throwing out the Texas law adopted by the Texas Legislature and ordering all 23 Congressmen to run at large — without regard to any district — unless a special session of the Legislature adopts a new law acceptable to those two men.

The Republican judges' opinion orders our Legislature to divide the state into districts based entirely on population and nothing else. This principle has never been announced by any federal court. Moreover, the U. S. Supreme Court up to now has never held that federal courts have power to interfere with Congressional districts created by state legislatures.

To protect the State of Texas from this unprecedented extension of federal power, I have asked the Attorney General to appeal from this court order and oppose it with every available legal weapon. Accordingly, every effort will be made to obtain a stay order to hold the federal order in suspense until the Supreme Court decides the cases now before it.

The Supreme Court is now considering six cases involving Congressional and legislative redistricting. One case, involving the Georgia Congressional districts, will be argued before the Supreme Court on November 12, only three weeks from now. Even Judge Brown, who wrote last Saturday afternoon's opinion, conceded that

> "We are certainly in agreement . . . that much is to come from the Supreme Court decisions in these pending cases . . . Of course, one of the cases could be dispositive. If the Supreme Court affirms *Wesberry* v. *Vandiver* (the Georgia Congressional case) it would, in effect, be a declaration that Congressional apportionment must be left to the respective State Legislatures unfettered by anything that a Federal Court may do with the only ultimate relief being from Congress. If that result transpires, then no action would be authorized on our case."

Judge Brown further conceded that in the event the Supreme Court ultimately disagreed with the special three-judge court,

> "then it indeed would be a great misfortune were this Court to enter a decree compelling immediate remedial action by Texas. There would not only be the great expense of a special session of the Legislature. More serious, that result would be out of keeping with the proper role of the Judiciary — certainly the Federal Judiciary in our Federalism. Legislative changes is a matter which is essentially legislative in nature ought not to be brought about, even on a contingent basis, by the coercive pressures of a Federal Court injunction."

However, after conceding that a Federal Court ought not to force Congressional redistricting and after admitting that a case to be argued before the Supreme Court in three

weeks may very well decide that federal courts have no authority to act in such matters, two Republican appointees refused the defendant's request to postpone a decision in the Texas case for a few weeks until the Supreme Court has acted in the Georgia case. Instead, these Republican judges held that all Texas Congressmen must run at large next year — an order not even asked for by the suing Republicans. And, as Judge James L. Noel, Jr. noted in his dissenting opinion:

> "The at-large elections ordered today are just as certain to set county against city, small city against large city, economic interest against economic interest, area against area, county against county, district against district, and generally foment antagonism, as night follows day. It seems to me that common sense, appropriate perspective and carefully weighed regard for the political rights of all of the people of Texas require that such mandatory type relief not be granted."

It has long been supposed that in addition to a population count, state legislatures, in drawing congressional districts, can take into account other factors, such as geographical, area, economic, social, topographical, sociological, and political considerations. All of these factors, except population, have now been thrown out by two federal judges, and, in effect, they have told the Texas Legislature that they will not be satisfied unless and until the Legislature divides our 1960 population into 23 equal districts having 416,507 and ⅔ people in each district.

This sounds easy but is almost impossible to do unless we destroy county lines and perform major surgery on some of our cities. It is impossible to maintain our present city and county boundary lines and still reach the utopia so eagerly sought by our Republican friends.

The Republicans now pose as the great champions of our privilege of equal representation. However, the bill sponsored by the Republicans in our last legislative session would have merely given our at large member to their hometown of Dallas. What did they want to do for Houston, Fort Worth, San Antonio and El Paso or the rest of the State for that matter? Their answer to redistricting was partisan political expediency and it's a credit to the 58th Legislature that their bill was rejected. And now this Republican court has summarily rejected this solution as doing nothing to cure the discrimination found.

As Governor of Texas, I deeply resent the arbitrary and presumptive action by the Republican special court in telling the people of Texas how to run their business.

I am for redistricting. I told the court that. But I am for doing it in a sane, sensible, orderly manner, with full recognition of the problems involved. Redistricting obviously will require major surgery to many of the existing districts. There is no way it can be done without destroying county lines. There is every possibility that part of Dallas will end up in the same district with part of north or east Texas; that part of Houston will end up with a nearby rural area with uncommon interests; that part of Fort Worth will end up with part of West Texas. To assume that even with diligent work, the Legislature can agree on such far-reaching legislation in one 30-day session . . . or even two or three, is completely unrealistic, particularly if the Legislature does not know what, if anything, is going to be required of them in this plan by the federal courts.

Yet in the face of this complexity, the Republican special court completely ignores the facts of life and hands down an arbitrary decision saying either you call a special session

to redistrict, or all Congressmen must run at large until you do. And in almost the same breath, they say "of course we can't tell you what kind of plan the Supreme Court will ultimately approve because that hasn't been decided yet, and really, we're not sure we even have authority to tell you to do all this. But you go ahead anyway, right now, and spend $400,000 for a special session and come up with some kind of plan even though you may be wasting your time and money."

This is sort of like a building inspector coming to see you and telling you that you'll have to tear down the house you've lived in for years because it's in violation of the building code, but that he can't tell you the plans or specifications that are required by the building code, and he's really not even sure he has the authority to tell you to tear down your house. Then telling you in parting that you'd better go ahead and get your building crew to work tearing down that house and building an expensive new one anyway, regardless, because a couple of neighbors down the street just don't like your house.

Now isn't that ridiculous?

And as if such a ruling by a federal court — even a Republican dominated federal court — isn't enough to shock the people of Texas, we have the sorry spectacle of U. S. Federal Judge issuing a press statement to explain the meaning of his 28-page opinion before the ink was dry, something unheard of in judicial proceedings.

I think the issue is very clear: we all agree that redistricting needs to be done. But it is the responsibility for the Legislature, not of the federal courts. I have every confidence, as I told the court, that the 59th Legislature will

do the job, just as this state has done the job for years, without being told to.

Amidst all the sudden hue and cry by a few over redistricting, let's remember that we have lived under our present system of representation in this state since 1845, when we joined the union. I do not know of any great or irrepairable damage being done to the people of Texas . . . I know of no great emergency of life or property . . . I know of no great overwhelming or compelling need or demand for emergency action on redistricting outside of a few militant Republicans with obvious self interest.

There is far more danger to the people of Texas, in my opinion, when two Republican federal judges take it upon themselves to substitute their judgment and wisdom for that of our 181 elected representatives. Preservation of the vital separation of powers is far more important to the people of this state than whether we redistrict the next six months. I for one want to see the matter of representation left in the hands of our elected representatives, who are answerable to the people every two years, rather than to these Republican judges, who are answerable to no one for the rest of their lives. I think that is just one more example of a court attempting to make laws, rather than interpret them.

Certainly I'm not going to defy a court order. But just because these two Republican judges say something doesn't make it gospel. As far as I am concerned, this court is not infallible. They already have proved that by issuing a modification of their order less than 72 hours after it was released saying no, they didn't mean for it to apply to the special congressional race in Travis County . . . yet that's

not what the order says. This is but one example of the confusion and chaos created by their hasty actions.

So I intend to resist their actions by every legal means. I have no intention of calling a special session, which would cost the taxpayers of this state $400,000 for what could be a ridiculous 30 days game of Blind Man's Buff unless and until all other avenues of action are closed. And if such a special session does eventually become absolutely necessary under court compulsion the blame for the $400,000 bill lies at the feet of the Republican court whose coercive action forced it.